Supreme Court of the United States.

October Term, 1951.

No. 567.

THE DELAWARE AND HUDSON COMPANY,
Petitioner,

v.

BOSTON RAILROAD HOLDING COMPANY ET AL.

BRIEF ON BEHALF OF RESPONDENT NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY IN OPPOSITION TO ALLOWANCE OF PETITION.

The facts are adequately stated in the petition and there is no occasion to discuss them in detail. However, it may be helpful to sketch precisely what the situation is and how it came about.

The New Haven and the Commonwealth of Massachusetts were at odds over whether the New Haven might control the Boston and Maine. Their differences were composed by the incorporation of the Holding Company by special act (St. 1909, c. 519) with a unique corporate structure made more unusual by the amendment of the following year (St. 1910, c. 639), the conveyance of the controlling block of Boston and Maine stock to the Holding

Company, and the issue of the Holding Company's own stock, both common and preferred, to the New Haven. The preferred stock constituted a single class and was given a lien on all the Holding Company's Boston and Maine securities. The New Haven sold some of the preferred stock which it had purchased and in conformity with the statutory requirement guaranteed both dividends and face of that which it sold.

Each share of the preferred, both those shares retained by the New Haven and those which it sold, was secured by the statutory lien. *Hurley* v. *Boston Railroad Holding Co.*, 315 Mass. 591. The Supreme Judicial Court has held that the result of the guaranty made by the New Haven was to subordinate its interest in the common security to the interests of the other preferred shareholders to whom the guaranty ran (see Rec. pp. 95, 96). The petitioner argues that this determination is binding on this Court under *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (Petition, p. 17), and we agree.

Shortly after the sale of the preferred stock, the United States brought a bill in equity against the New Haven, the Holding Company and others in the District Court for the Southern District of New York to restrain alleged violations of the Sherman Act. The New Haven's control of the Boston and Maine through its ownership of the Holding Company, all pursuant to St. 1909, c. 519, and St. 1910, c. 639, was one of the alleged violations. That suit was concluded by a consent decree entered in 1914, which, as far as is presently material, required the New Haven to transfer its common and preferred stock in the Holding Company to trustees upon trusts established by the decree. Those trusts required the trustees to cause the sale of the Boston and Maine securities of the Holding Company and then to liquidate the Holding Company. This was to be done by the trustees in their capacity as control-

ling stockholders of the Holding Company. On liquidation they were directed to distribute the proceeds, first, in payment of their own expenses and of debts of the Holding Company; second, to the holders of the preferred stock carrying the guaranty to the amount of its face and accrued dividends; and, third, to the New Haven. They were given power to subordinate the statutory lien on the Boston and Maine securities attaching to the preferred shares received by them from the New Haven to that attaching to the shares which had been guaranteed—but this was no more than a power and it was never exercised.

The sale of the Boston and Maine securities was never made and the trustees took no steps to liquidate the Holding Company, and in 1923, at the instance of the New Haven, the court amended the 1914 decree by striking out all of its provisions relating to the Holding Company—subject, however, to the proviso that "the right attaching to" the preferred stock of holders like the petitioner "to be preferred in any liquidation . . . to the remaining shares of . . . preferred stock . . . shall in no manner be diminished or impaired," and that the certificates should be "stamped as entitled to such preference."

The certificates for the stock were stamped as so directed. No amendment was made to either St. 1909, c. 519, or St. 1910, c. 639. The Supreme Judicial Court held that this proviso did no more than reaffirm that preference in liquidation of the Holding Company which the guaranteed preferred shares already had over the remaining preferred shares arising out of the guaranty and dependent upon its continuance in force.

In 1935 the New Haven went into bankruptcy in the District Court for the District of Connecticut. In due course a claim was filed on the guaranty and a protective committee for the holders of guaranteed Holding Company preferred stock was formed. The committee laboured

manfully in the reorganization proceedings to preserve the guaranty and otherwise to advance the interests of its depositors. But by 1944 the Interstate Commerce Commission had directed disaffirmance of the guaranty. The committee (which had represented some 19,000 guaranteed preferred shares) then dissolved and the petitioner acquired most of its 10,000 shares from those theretofore represented by the committee.

The focus of the endeavour on behalf of the guaranteed stock then shifted from the reorganization proceedings to the Massachusetts legislature, with the result that St. 1946, c. 518, dissolving the Holding Company was passed and the present receivership initiated. The receiver was appointed in 1949.

Meanwhile, the bankruptcy reorganization was terminated by decree of the Connecticut District Court on September 11, 1947. The Supreme Judicial Court held that the discharge contained in that decree terminated the guaranty and that with the guaranty the right of the petitioner and the other holders of guaranteed stock to be preferred to the New Haven as the holder of preferred stock not guaranteed fell. That is the occasion for the present petition.

There are, consequently, three holdings by the Supreme Judicial Court which are pertinent: first, that the subsisting guaranty required subordination of the lien of the New Haven's preferred to that of the guaranteed preferred; second, that the bankruptcy decree destroyed that subordination when it destroyed the guaranty; and third, that the 1923 decree created no rights which did not exist before it was entered. The petitioner relies upon the first holding as its basis for attacking the second as federal error. It likewise attacks the third.

NO SUBSTANTIAL FEDERAL QUESTION ARISES FROM THE CONSTRUCTION PLACED ON THE BANKRUPTCY DECREE.

The respondent relied successfully upon the discharge contained in the bankruptcy decree. Since the decree was effective only because of a statute of the United States (§ 77(f) of the Bankruptcy Act, U.S.C. Tit. 11, § 205(b)), the second holding of the Supreme Judicial Court comes within the wording of U.S.C. Tit. 28, § 1257(3), but there is no substance in the point to move this Court to grant the writ. The petitioner does not assert that any error was committed in the bankruptcy court or that the guaranty as such was not discharged by the bankruptcy decree. It could not make such an assertion if it would. All that the state court held with reference to the bankruptcy decree was that it destroyed the guaranty. Granting (without conceding) that that construction raises a federal question, it is so patently right that it is quite without substance. A pre-1916 writ of error based upon it must have been dismissed as frivolous. Petitioner's point here is not that the construction of the decree as discharging the guaranty is wrong, but that the first holding of the Supreme Judicial Court, that the subordination consequent on the guaranty would not survive the guaranty was wrong —and that, right or wrong, is a question of state law.

The portion of the opinion establishing the subordination of the lien consequent on the guaranty appears at pages 95 and 96 of the record and is quoted at page 16 of the petition. On the next page the petitioner affirmatively states it is state law and warns this Court off with the citation of the *Tompkins* case. It is true that the passage quoted deals only with the birth of the right to subordination, but if state law sired the right, state law likewise determines the span of its life. The Supreme Judicial Court held that the continued life of the subordination required

the continued life of the guaranty, and the guaranty died on the entry of the bankruptcy decree.

The flaw in the petitioner's argument is made apparent by the statement at page 18 of the petition:

> "The court thus stressed those provisions of the final decree which revested in the reorganized New Haven its property free and clear of all claims, liens and encumbrances of creditors of the New Haven. In doing so the court completely overlooked the fact that the right asserted by your petitioner was not a claim, lien or encumbrance on the New Haven's preferred stock. Rather it is a right to priority in liquidation of the Boston and Maine stock owned by the Holding Company, never a debtor in the reorganization of the New Haven. The rights asserted by your petitioner are rights in property of the Holding Company, not in property of the New Haven."

In this statement the petitioner tacitly acknowledges the necessity of its case—that it must show a right within the corporate structure of the Holding Company rather than a right against the New Haven based upon the New Haven's guaranty—but it misstates the holding of the Supreme Judicial Court on which it does and must rely.

The rule of state law accepted by the Supreme Judicial Court at the petitioner's instance was that, "if the guarantor were to share in the proceeds of the security before the holders of the guaranteed obligations have been paid, he would be derogating from his guaranty" (Rec. p. 16). The "security" here was the statutory lien on the Boston and Maine stock which the Supreme Judicial Court had held in the *Hurley* case (315 Mass. 591) attached to all shares alike, and that lien has not yet been discharged. The assets subject to it are now being marshalled by the Supreme Judicial Court. If there were still a guaranty, a direction to the receiver to pay any of the proceeds to the

New Haven before all guaranteed stock had been paid in full would, under the language just quoted, constitute a derogation from the guaranty. But if the guaranty had gone, there could be nothing from which to derogate. The fashion in which the guaranty was terminated is immaterial. As it happened, it was terminated by the bankruptcy discharge, but the result would have been the same had it been terminated by a release.

The important point which the Supreme Judicial Court had steadily in mind, but which the petitioner, understandably, does not emphasize, is that the rule of law requiring subordination is one which establishes rights as between two persons having, save for the effect of the obligation of the collateral guaranty of one, common security rights in the property of a third. The rule, solely by reason of the operation of the guaranty, gives one of two tenants in common of a single first mortgage preference over his fellow. It has nothing to do with the relative claims of a first mortgagee against a second mortgagee—who are not fellows at all. Where there are two mortgages, a first and a second, the first has priority because the mortgagor's deed has given the second only a junior right. The second mortgagee has in no way subordinated himself permanently or temporarily to the first. The mortgagor did it for him. But where there is a single mortgage of which our two hypothetical lienors are holders in common, there is subordination only through the act of one of the two, and he can make the subordination permanent or temporary according to how he draws his deed. The "deed" here was the implication raised by law from the guaranty. The law was the law of Massachusetts, and the Supreme Judicial Court of Massachusetts says that the term granted by that "deed" was the term of the guaranty. The habendum was not in fee; it was a "so long as" estate, a determinable fee —here so long as the guaranty remained in force.

To avoid this, the petitioner asserts that the Supreme Judicial Court "completely overlooked the fact that the right asserted by your petitioner was not a claim, lien or encumbrance on the New Haven's preferred stock" (Petition, p. 18), but rather a true preference residing in the corporate structure of the Holding Company. The Supreme Judicial Court overlooked nothing. It *held* that the claim to subordination which it recognized on the authority of the cases cited by the petitioner *was* "a claim, lien or encumbrance on the New Haven's preferred stock" and was *not* a preferential right running from the Holding Company to the petitioner.

As far as the bankruptcy decree went the Supreme Judicial Court in no fashion held that it varied in any particular the right which any stockholder, preferred or common, guaranteed or not, had in 1911, in 1923, or on September 10, 1947, against the Holding Company. It had already held in *Hurley* v. *Boston Railroad Holding Co.*, 315 Mass. 591, that the lien on the Boston and Maine stock attached to all of the Holding Company preferred; it did hold in its current opinion that the rule advanced by the petitioner required that, *so long as the guaranty was outstanding*, the New Haven must defer its claim to share in the proceeds of the Boston and Maine stock to those of the preferred stockholders whose shares it had guaranteed, and it did hold that the bankruptcy decree discharged the guaranty and carried the Holding Company preferred to the reorganized company free of pre-existing encumbrances. But that was all. It did not hold that the bankruptcy decree in any way touched obligations of the Holding Company, which was not a party to the bankruptcy case, running either to the petitioner or to the respondent.

As far as federal law is concerned, the utmost limit of the holding is that the bankruptcy decree put an end to the guaranty and to any encumbrance on the New Haven's pre-

ferred stock in the Holding Company. Even the petitioner does not dispute that to have been so.

THE 1923 DECREE ACCOMPLISHED NO CHANGE IN THE CORPORATE STRUCTURE OF THE HOLDING COMPANY.

The petitioner therefore argues that its asserted right to be preferred runs not against the New Haven but against the Holding Company itself; in other words, that it is a true preference created within the corporate structure of the issuer of the security. But the 1923 decree neither did nor could vary the corporate structure of the Holding Company.

What classes of stock there may be within a corporation and what their relative preferences are to be depends entirely upon the provisions of the "charter" of the corporation. In the case of the Holding Company that "charter" was the two statutes St. 1909, c. 519, and St. 1910, c. 639. Those statutes established two classes of stock only, common and preferred. There was only one authority which could amend that "charter" and establish a third class of stock, and that was the Massachusetts legislature.

The District Court for the Southern District of New York had plenary power to require all persons before it to do all things necessary to put an end to a violation of the Sherman Act and, by way of prophylactic justice, to prevent any recurrence. But it could not directly amend a statute passed by the Massachusetts legislature or otherwise directly vary the stature of a corporation erected by that legislature. The petitioner cites several cases from this Court (see Petition, p. 26) to the effect that divestment of control over subsidiaries is an appropriate item for inclusion in the decree in an anti-trust case. That is perfectly true, but the decree in each of those cases was limited

to an injunction directing action by stockholders to accomplish the desired divestment. In no instance was there any attempt directly to vary the capital structure of any corporation. In *Columbia Gas & Electric Corp.* v. *United States,* 151 F. (2d) 461 (cited at p. 27), the decree was by a reorganization court which clearly did have powers over the assets behind the securities.

This was the same pattern which the District Court for the Southern District of New York adopted in the 1914 decree. The petitioner suggests that it had taken possession "of the assets of the Holding Company itself" (Petition, p. 26), but that goes one step, and a vital step, beyond the facts. What that court did do was to cause the New Haven, through the coercion of its injunctive power, to place the New Haven's stock in the Holding Company in the hands of the court's trustees, and then, through its directions to its trustees, to direct them through the exercise, by them as individuals, of their voting power to deal with the assets of the Holding Company to the satisfaction of the court. There is a fundamental distinction here. In no particular in the 1914 decree did the court attempt itself directly to do anything either to the capital structure of the Holding Company or to its assets. It followed precisely the same *modus operandi* which this Court had approved in the *Northern Securities* case (193 U.S. 197), the *Standard Oil* case (221 U.S. 1), and the *Union Pacific* case (226 U.S. 61), and was later to approve in the *Ethyl* and *Crescent* cases (309 U.S. 436, and 323 U.S. 173), all relied on by the petitioner. All it did was to require the New Haven to turn over its stock and then to empower the grantee-trustees, through the voting rights inhering in the stock, to vary the capital structure of the Holding Company through release or subordination of the statutory lien in their discretion—powers which were never exercised.

When it undid in 1923 what it had done in 1914, the Supreme Judicial Court held it did not attempt to go further. It is hard to see what other construction could have been adopted. The words on which the petitioner relies are in a provision limiting the effect of the dispositive words which precede them. It would be completely novel to have an entirely new right created by a limiting proviso. The dispositive words were those striking out the portions of the 1914 decree dealing with the Holding Company stock and the proviso was "excepting that the right . . . to be preferred . . . shall in no manner be diminished or impaired . . ." (Rec. p. 83). As matter of language, the exception must relate to an existing situation, not one newly created by the negative of an exception. The negative pregnant is the ineptitude of a pleader; it has no place in the decree of an astute court. And no negative could be sufficiently pregnant to produce the monstrosity which the petitioner seeks to find.

All of this leads to the underlying question of whether this exercise of construction presents a federal question worthy of the consideration of this Court. It is true that the petitioner claims that on its construction its stock which had been issued in 1910 as ordinary preferred stock had been made a prior preferred stock by the 1923 decree, and so makes a claim "under . . . authority exercised under, the United States," within the language of U.S.C. Tit. 28, § 1257(3). But it is likewise true that the Holding Company in 1923 was a Massachusetts corporation, the creature of the Massachusetts legislature, and its corporate structure could only be varied by the operation of Massachusetts law. The Massachusetts court has held that its corporate structure was not varied, and it did so in discharge of a special jurisdiction specially delegated to it by the Massachusetts legislature which had first fashioned that corporate structure.

The Supreme Judicial Court was the sole forum in which under St. 1910, c. 639, the statutory lien could by the terms of the statute be enforced. Before 1946, on a petition seeking foreclosure of the lien, it had held that the guaranteed stock could not enforce the lien except with the concurrence of enough of the remaining stock to constitute a majority—in other words, that there was no class of prior preferred, but only a single class of preferred, comprising both that which was guaranteed and that which was not. *Hurley* v. *Boston Railroad Holding Co.*, 315 Mass. 591. That decision was, of course, known to the legislature, and if it misstated the legislative will, it could easily have been rectified. But the legislature passed no statute declaring the case to be wrong. On the contrary when it passed St. 1946, c. 518, under which this proceeding is brought, it specifically referred to the Supreme Judicial Court the question of relative preference.

The jurisdiction of the Supreme Judicial Court over the liquidation of the Holding Company is a statutory jurisdiction. The statute contained most unusual provisions as to how that liquidation was to be accomplished, among which was one for a plan "approved by a majority of each class of stock (including as a separate class the publicly held preferred stock if the court shall determine that such preferred has rights differing from the rights of the other preferred)." St. 1946, c. 518, § 4. The parenthetical phrase was the invitation which spurred the petitioner to bring its petition in the Supreme Judicial Court in the first instance. Far from recognizing that any change in the corporate structure had been effected, the legislature referred the question to the Supreme Judicial Court, which answered that there had been none.

It is hard to conceive of a question more completely within the field of state law than that of how the structure of a creature of the state legislature shall be changed. Yet

that is the question which the present petition asks this Court to pass upon. We submit that in its discretion it should refuse to do so.

The petitioner cannot avoid this by suggesting that the asserted change in the corporate structure of the Holding Company was accomplished, not by the 1921 decree *perpetua vigore*, but by the stamping in conformity with the order of the decree. The Supreme Judicial Court did hold that the stamping did not give a preference, contrary to the petitioner's earnest argument, but that holding may not be reviewed by this Court. When the petitioner claims under the act of the corporation it is not claiming "under . . . authority exercised under, the United States," and U.S.C., Tit. 28, § 1257, gives no jurisdiction to review.

As a matter of discretion this Court should deny the petition.

This case is unique. There never have been and probably never will be again preferred stock clauses like those contained in St. 1910, c. 639. The provisions of St. 1916, c. 318, are likewise unique. There can be no occasion to grant the writ in order to settle an unsettled state of the law as a guide to litigants in future litigation—both because the law is not unsettled and because there is no probability that there will ever be any similar litigation in the future. There is no conflict between the holding of the Supreme Judicial Court and any opinion of this Court which requires resolution. In the exercise of its discretion, this Court functions as a statesman as well as a judge. If the issues presented are not sufficient to move the statesman, who must keep his eye and mind on broad issues, it is not enough that they might suffice to move the judge, who looks only to declaring the rights of the parties before him. The best recent statement is that of the Chief Justice

quoted in Stern and Gressman, Supreme Court Practice, at page 98:

> "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. . . . The function of the . . . Court is . . . to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts. If we took every case in which an interesting legal question is raised, or our *prima facie* impression is that the decision below is erroneous, we could not fulfill [our] responsibilities . . . To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved."

The only conflict with any decision of this Court asserted by the petitioner is with *Zavelo* v. *Reeves*, 227 U.S. 625, 629 (Petition, p. 19). There is no conflict. That case held that the familiar rule that a moral obligation which will supply the place of consideration and support a subsequent promise to pay persists after a discharge in bankruptcy, and that the subsequent promise may be made during the pendency of the bankruptcy proceedings. (The first authority which the Court cited was from Meeson and Welsby.) The Supreme Judicial Court held that a subordination consequent on the guaranty would not survive the bankruptcy discharge on the asserted theory that the discharge operated only to end the remedy to enforce the guaranty rather than the obligation of the guaranty. Since there was no new promise which could revitalize the obligation under

the rule recognized in *Zavelo* v. *Reeves*, there was no possible conflict. The nearest thing to a conflict with that rule was the quotation from *"The Western Maid,"* 257 U.S. 419, which is in the reports of this Court.

As far as bankruptcy practice is concerned, there is nothing in the least novel. The petitioner does not dispute that the bankruptcy ended the guaranty as such. The respondent never claimed that the bankruptcy in any way affected any obligation of the Holding Company to the petitioner or to any preferred stockholder. The Supreme Judicial Court did not go beyond the respondent's claims. And the bankruptcy court itself recognized that it was not disturbing any preferences within the Holding Company's corporate structure. So that there can be no misconception on this point, we print an unreported opinion of Judge Hincks in the bankruptcy case, which was cited to the Supreme Judicial Court, as an appendix to this brief.

Neither is there any point of general interest in the antitrust decrees. That of 1914 followed the conventional pattern. That of 1923 was unusual only because of the proviso which patently was included only out of an abundance of caution. The Supreme Judicial Court in no way disregarded the validity of the decree. It merely construed its words and concluded they would not support the petitioner's claim. The one judge who disagreed (Counihan, J.) did not see fit to state his reasons. We submit that we have shown that the court's construction was right, but even if it was wrong, it raises no point of general interest.

Finally, on this point, the dismissal by this Court (336 U.S. 932) of the appeal of the present respondent and of the Holding Company from the earlier decision of the Supreme Judicial Court in this same proceeding is not without pertinence. On that appeal the appellants sought to show that the statute under which the present petition is brought (St. 1946, c. 518) offended against the obligation

of contract clause of the Constitution. Whether it did or not depended wholly upon the correct construction of St. 1909, c. 519, and St. 1910, c. 639. The Supreme Judicial Court had so construed them that there was no violation. We challenged that construction. This Court dismissed our appeal on the jurisdictional statement for want of a substantial federal question. It is, of course, true that such a dismissal does not constitute a binding precedent on which we can rely, but it is also true that the federal question presented on the present record is no more substantial.

We ask the Court to deny the petition.

Respectfully submitted,

JOHN L. HALL,

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Attorneys for the Respondent.

Appendix

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF CONNECTICUT

In Proceedings for the Reorganization
of a Railroad

In the Matter of THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor.	No. 16562

MEMORANDUM OF DECISION ON PETITION FOR ORDER 570

The Boston Holding Company was incorporated in Massachusetts under the Special Act of June 18, 1909 "for the sole purpose of acquiring and holding the whole or any part of the capital stock, bonds and other evidences of indebtedness of the Boston and Maine Railroad, and of voting upon all certificates of stock so acquired and held, and of receiving and collecting dividends and interest upon said stock, bonds and other evidences of indebtedness." This Act (Sec. 2) authorized the issue only of common stock (originally $100,000): no provision was made therein for the issue of preferred stock.

By the Special Act of June 15, 1910 the Holding Company was authorized to issue preferred stock.

In conformity with these two Acts the New York, New Haven and Hartford Railroad Company acquired and still holds all of the common stock of the Holding Company.

The New Haven also, in accordance with said statutes, acquired and still holds 244,933 shares of Holding Company preferred stock. In addition, prior to September 22, 1906, there were outstanding in the hands of the public 28,000 shares of preferred stock which pursuant to the provisions of the Acts just referred to had been originally acquired by the New Haven for full value and on their sale had been guaranteed by the New Haven as to principal ($100. par) and dividends. Of these guaranteed shares the New Haven purchased 3,850 shares, of which it later sold to the Holding Company 1,030 shares. As a result of these transactions, the 28,000 shares guaranteed by the New Haven, which at one time were outstanding, are held now 2,820 by the New Haven estate, 1,030 in the treasury of the Holding Company and 24,150 by the general public.

For many years during which dividends were suspended on the stock of the Boston and Maine, the New Haven by virtue of its guaranty provided the funds for the payment of the stipulated four per cent dividend on the preferred stock of the Holding Company. Two such payments were made after the institution of these proceedings. However, beginning with the dividend due January 10, 1938, the New Haven trustees discontinued payments under the guaranty, and under a plan of reorganization for the New Haven proposed by the Interstate Commerce Commission and approved by the court by order entered as of even date herewith, the New Haven's guaranty of said preferred stock was permanently rejected. Thus the guaranteed dividends on the cumulative preferred stock of the Holding Company have been in default since January, 1938. And the approved plan operates as a final breach of the guaranty relieving the New Haven estate of obligation (a) to pay all dividends heretofore accrued and hereafter accruing on the guaranteed stock and (b) the par value thereof to the holders of said stock. For this breach of guaranty

the holders of the guaranteed stock under Sec. 77 of the Bankruptcy Act are entitled to claim in damages against the New Haven estate,—a claim which under the approved plan of reorganization will be discharged, when adjudicated, in a proportionate share of the new common stock of the New Haven.

The pending petition is brought by a committee of holders of the guaranteed preferred stock of the Holding Company who pray that the New Haven trustees be ordered to surrender the 247,759 preferred shares of the Holding Company in the New Haven estate. If this were accomplished the preferred stock which is publicly held would constitute a majority—indeed, the entire preferred stock outstanding—and hence would be plainly entitled under Sec. 4 of the Act of 1910 to apply to the Supreme Court for a sale of the Boston and Maine stock held by the Holding Company.

In the alternative, the petitioners pray that the New Haven trustees as the holders of the preferred stock of the Holding Company in the New Haven estate be ordered to join with the holders of the publicly-held preferred stock in an application to the Supreme Judicial Court of Massachusetts to enforce their claimed lien. And Edmund J. Hurley, a preferred shareholder in the Holding Company, has filed a petition to intervene and seeks an order requiring the New Haven trustees to distribute amongst the holders of the publicly-held guaranteed preferred stock of the Holding Company all the common stock of the Holding Company now owned by the New Haven estate.

These petitions must be denied.

It is true that these are days of adversity for the Holding Company. Since January 1, 1932 no dividends have been paid on the Boston and Maine stock owned by the Holding Company, leaving the Holding Company without income available for dividends,—at least for the time be-

ing. And during this same period of adversity the New Haven's guaranty, upon which—but for the intervention of bankruptcy—the publicly-held stock might have relied for the continued payment of its dividends, has been permanently rejected. But the resulting misfortune to the holders of the publicly-held preferred stock does not constitute legal ground for the ex-appropriation of the common stock or the preferred stock owned by the New Haven estate. Although under Sec. 77 holders of the publicly-held preferred stock have a claim in damages which they are entitled to prosecute they may not divert to their exclusive recompense assets owned by the New Haven estate to which other creditors of the New Haven have an equal right to look.

Nor may the New Haven trustees be required to join with the holders of the publicly-held stock in an application, under the statutes referred to which constitute the charter of the Holding Company, to the Supreme Judicial Court of Massachusetts for the sale of the Holding Company assets. Such a course is plainly not to the advantage of the New Haven estate. Nor is it a course required under any obligation imposed by the Massachusetts statutes.

The Act of 1909 to which the Holding Company owes its existence contains no limitation upon the life of its corporate creature. The corporation was created "for the sole purpose of acquiring and holding the whole or any part of the capital stock," etc., of the Boston and Maine. Granted that adverse conditions have temporarily deprived the enterprise of profit, nothing has transpired to frustrate the legislative authorization to *hold* the investment made in happier days.

The Act of 1910, which authorized the issue of preferred stock and defined its appurtenant rights, in Sections 1 and 2 subjected the Boston and Maine stock owned by the Holding Company to a lien in favor of the preferred stockhold-

ers of the Holding Company. This lien was designed to give the preferred stock "preference and priority over all other stock of the corporation," i.e., over its common stock. But under Section 1 the lien in favor of the preferred stockholders was enforcible not upon the issue of the preferred stock but only (a) "upon dissolution of the corporation or in liquidation of its affairs," or (b) "in case of a default in the payment of any stipulated dividend on said preferred stock." Only upon the occurrence of either of these two events was the lien subject to the form of foreclosure specified in the Act.

But even if the liens should thus become subject to foreclosure, the Act does not provide that every stockholder should have the right to institute foreclosure proceedings. On the contrary, Section 4 of the 1910 Act provides that "the holders of a majority thereof may, in case of a default in the payment of any semi-annual dividend upon such preferred stock, apply in person or by attorney to the Supreme Judicial Court for an order for the sale of said Boston and Maine Railroad stock." The phrase "holders of a majority thereof" plainly refers back and means a majority of all the preferred stock issued and outstanding under the previous sections of the Act,—not the guaranteed stock mentioned only in a later section of the Act. (Sec. 5).

Thus, an application by a majority of all the preferred stock outstanding is the only remedy stated in the Act for the enforcement of the lien. It must be taken as the exclusive remedy intended. Were any single stockholder or a minority group of stockholders, such as those holding the guaranteed stock, intended to have a right to enforce a sale, the authority conferred by Section 4 upon a majority of the stock would have been unnecessary and meaningless.

Section 5 of the Act of 1910 I think somewhat confirms this construction. It provides that any railroad owning

common stock of the Holding Company may acquire and freely sell not *all* its preferred stock in the Holding Company but "*any* of the preferred stock authorized by the Act." Thus the legislature must have had in mind a situation such as that which exists here where the New Haven as a preferred stockholder sold and guaranteed only a minor fraction of its preferred stock. With authority thus expressly granted to create a minority holding in the stock, the absence of provision whereby minority stockholders might apply for a sale and precipitate a liquidation must have been deliberate. It must have been intended that those thus purchasing a minority interest should hold subject to the right exclusively reserved to the majority.

The conclusion indicated is required, I think, even if the petitioners are right in their contention that in a liquidation the publicly-held preferred stock will be entitled to priority over the preferred stock held by the New Haven. This contention is based upon the 1923 decree of the United States District Court for the Southern District of New York which so provided. But nothing in that decree purports to alter, or is effective to alter, the provision of the Massachusetts Act whereby the right to apply for a sale and thus to bring about a liquidation is reserved to a majority of all the preferred stock outstanding.

Although for purposes of this decision I may assume, as petitioners contend, that the publicly-held preferred stock on a liquidation will have priority over that held by the New Haven, I must make it plain that I am not now satisfied to sustain the claimed priority on the merits. Dissolution proceedings brought by the Government against the New Haven resulted in a decree in 1914 providing for the liquidation of the Holding Company. But before the liquidation was accomplished the modified decree of 1923 was entered by consent whereby the Holding Company was returned to its owners. Granted that it was contemplated

that the publicly-held preferred stock should be preferred in the enforced liquidation envisaged by the original decree or in any future liquidation contemplated by the modified decree, it must not be forgotten that the publicly-held preferred was then guaranteed by a solvent New Haven. With the New Haven solvent, it made no difference to its estate whether in a liquidation the publicly-held preferred stock of the Holding Company was preferred to that held by the New Haven, or not: in so far as the publicly-held preferred stock was not liquidated in full from the assets of the Holding Company, it was entitled to look to the solvent New Haven for the payment of any deficiency. But this situation was radically changed by the bankruptcy of the New Haven: no longer is it a matter of indifference to the New Haven estate, now relieved of its guaranty, if the publicly-held preferred stock of the Holding Company is so preferred.

Thus is posed a serious question whether a decree in the dissolution proceedings not brought for the determination of private rights *inter sese*, under the doctrine of *res adjudicata* may be taken to define the present rights of the New Haven estate as against the holders of the publicly-held preferred stock of the Holding Company who were not parties to the dissolution proceedings.

The New Haven's "consent" to the modified decree seems not necessarily to be a complete answer to this question. For this raises a question of jurisdiction over the subject-matter. If the United States Court in New York, in which the dissolution proceedings were brought, had jurisdiction in a proper case to terminate the New Haven's indirect right, through its control of the Holding Company, to vote the Boston and Maine stock owned by the Holding Company, it doubtless had incidental jurisdiction to accomplish that objective by ordering a sale of the Boston and Maine stock owned by the Holding Company and

by supervising the distribution of the proceeds. But when that court before the sale was accomplished found that the case was one not requiring the termination of New Haven control over the Holding Company and accordingly ordered the Holding Company assets returned to their legal owner, was not its jurisdiction exhausted? In such a situation, whence came jurisdiction to prescribe a classification of priorities in any future liquidation different from that existing when the court in New York took the property into its custody and different from that prescribed by the Massachusetts legislature in the Act of 1910?

The petitioners also remind me of the fact that pursuant to the modified decree in the dissolution proceedings certificates for 28,000 shares of the preferred stock of the Holding Company—some of which stock they now represent—were thereafter presented by the then holders thereof to the Holding Company which stamped them with an endorsement stating them to be "entitled to preference in liquidation according to the terms of the" dissolution decree as modified in 1923. It is apparently the suggestion of the petitioners that this transaction between the holders of the 28,000 shares and the Holding Company was effective somehow, perhaps by estoppel, to bind the New Haven as the holder of the remaining shares of the preferred. I have some doubt as to the validity of this contention also. Unless the dissolution decree, under the doctrine of *res adjudicata*, serves as the basis of an effective estoppel by judgment, it is difficult to see how a transaction between the Holding Company and certain preferred shareholders can serve as an estoppel *in pais*, binding the New Haven estate which apparently was not a party to the transactions giving rise to the alleged estoppel.

Since the petitioners have urged the claimed priority of the publicly-held stock to reinforce their contention that a mere majority of the publicly-held stock may apply for a

sale, while accepting the contention for purposes of this decision I have felt it proper to state the grounds for my present uncertainty as to the underlying merit of the contention. There is no need now to enter a definite ruling on the claimed priority.

Quite apart from the questions just posed relating to the effect of consent decrees and estoppels, the petitioners have cited a multitude of cases believed to support their position. But none, I think, support the proposition that under such circumstances as exist here minority stockholders may avail themselves of a right reserved to the majority to decide whether the corporate assets should be liquidated —a course which would entail the abandonment of the corporate enterprise.

Thus they cite a group of cases of which *Southern Pacific* v. *Bogert*, 250 U. S. 483, is perhaps typical. This case holds that a majority stockholder will be held to a fiduciary duty to account to the minority for the "fruits" of its action "which it has not shared with minority." The wrong there complained of was a refusal "to make a *pro rata* distribution on equal terms." But that is not the situation here. By refusing to apply for a sale, the New Haven trustees have not excluded the other preferred stockholders from their *pro rata* share in the fruits of a sale. And if at some future time the New Haven shall make such an application, under the Act of 1910 it needs must submit its claims to share in the proceeds for the determination of the Supreme Judicial Court of Massachusetts. (Section 4, last sentence).

Petitioners cite *Consolidated Rock Products Co.* v. *du Bois*, 312 U. S. 510, for the observation that "a holding company . . . has fiduciary duties to security holders of its system which will be strictly enforced." It may be granted that pursuant to the sanction of Massachusetts statute the relationship between the New Haven and the

Holding Company is that of parent to subsidiary. But no breach of any fiduciary duty has been shown. The guaranty given the publicly-held stock created a legal—not a fiduciary—obligation. And that obligation was scrupulously performed by the New Haven until rejected in bankruptcy under the compulsion of a plan proposed by the Interstate Commerce Commission and order of court. For that legal breach the Bankruptcy Act gives the guaranteed stock a legal remedy, viz., a claim in damages.

Nor is my holding at variance with *Taylor* v. *Standard Gas Co.*, 306 U. S. 307. This is not a case in which a solvent parent is competing with the creditors or stockholders of a bankrupt subsidiary. The competition here for the mass of assets which comprises the New Haven estate is between the guaranteed stockholders of the subsidiary and other creditors of the New Haven whose plight is equally distressing.

Petitioners cite *Crimmins & Pierce* v. *Kidder, Peabody Acceptance*, 282 Mass. 367, 185 N. E. 393, for the proposition that the rights of stockholders in a private corporation as among themselves and as against the corporation are contractual rights flowing from the agreement of association subject to which the corporation came into existence. If this doctrine has application in the case of a corporation like the Holding Company which owes its existence to a special charter, it supports my holding that under the charter the exclusive right of the New Haven as the majority preferred stockholder to apply for a sale is not subject to interference from minority stockholders who when they bought "were in any event presumed to know of the provision" in the charter.

Petitioners, citing the dictum in *Chamberlain* v. *St. Paul Ry.*, 92 U. S. 299, invoke the doctrine that a creditor may look to the property of his principal debtor put into possession of a surety to indemnify the surety against loss

resulting from his undertaking, if the principal failure to foulto. There is no room for such doctrine here; the New Haven took no property from the Holding Company for its indemnification against future liability on its guaranty. The petitioners' suggestion that the New Haven right, as majority stockholder, to apply for sale, must be treated as the equivalent of a trust res under the doctrine invoked, is untenable. For the New Haven's right to apply for sale under the statute is not property belonging to the Holding Company. It is an independent right belonging to the majority stockholder upon whom it was expressly conferred by the Massachusetts statute.

Like the petitioners, I find no precedent involving the precise facts of this peculiar situation. However, there are clearly established legal principles which are applicable here, and determinative. Thus it is well established that majority stockholders having under the applicable law power to sell corporate assets may not be restrained from so doing by minority stockholders. *Wolcott* v. *American School Furniture Co.*, 122 Fed. 111; *Godkin* v. *Anaconda Copper Co.*, 245 Fed. 225 (cf. 258 U. S. 380); *Lange* v. *Reservation Smelting Co.*, 31 Pac. (Wash.) 208; *Bisset* v. *Crown Seal Co.*, 140 Atl. (Del.) 625; *Colby* v. *Equitable Trust Co.*, 128 App. Div. 262, 108 N. Y. S. 928. And this is so even though the proposed sale is motivated by, and will result in, a benefit to the majority in their capacity as creditors, *Bloom* v. *Consolidated Oil Co.*, 167 Atl. (Del.) 257, or as preferred stockholders, *Allied Chemical & Dye Corp.* v. *Steel and Tube Co.*, 120 Atl. (Del.) 486,—a benefit in which under the facts the minority stockholders do not participate. *Cf. Winkenbiller* v. *Standard Distilling Co.*, 115 Fed. 749.

Here we have a converse situation. But the same principles are applicable. Just as minority stockholders may not restrain a sale which under the law the majority has

power to make, so minority stockholders may not substitute their judgment for that of the majority and compel a sale which the majority opposes. And this is so even when the majority in its refusal to sell is motivated by legal interests in which the minority does not fully share,—as for instance where, as here, if the minority claim of privity should be sustained, any equity in the corporate assets for the majority will be extinguished unless the sale is deferred until the rising value of the corporate assets shall more than suffice for the satisfaction of the minority claim.

An order accordingly may be submitted for entry denying the petitions.

Dated at New Haven this 6 day of March, 1944.

C. C. Hincks,
United States District Judge.

No. 567

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Supreme Court of the United States

October Term, 1951

THE DELAWARE AND HUDSON COMPANY et al.,
Petitioners,

v.

BOSTON RAILROAD HOLDING COMPANY et al.,
Respondents.

MOTION OF DAYTON P. HAJOKEY AND ASSOCIATES FOR LEAVE TO FILE A BRIEF AS FRIENDS OF COURT, OR IN THE ALTERNATIVE, TO OFFER CONSIDERATION OF A BRIEF AS ON PETITION FOR REHEARING.

On Petition for a Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

JAMES ANGELL MacLACHLAN,
Solicitor.

Supreme Court of the United States.

OCTOBER TERM, 1951.

THE DELAWARE AND HUDSON COMPANY ET AL.,
Petitioners,
v.
BOSTON RAILROAD HOLDING COMPANY ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

MOTION OF DAYTON P. HAIGNEY AND ASSOCIATES FOR LEAVE TO FILE A BRIEF AS FRIENDS OF COURT, OR, IN THE ALTERNATIVE, TO OBTAIN CONSIDERATION OF A BRIEF AS CO-PARTIES PETITIONER.

Being in doubt concerning their procedural rights in this Honorable Court as members of the class of stockholders represented by the petitioner, Delaware and Hudson Company, in this class suit, applicants pray this Honorable Court to entertain this their motion for leave to file a brief as friends of court, without prejudice to any right they may have to submit a brief as co-parties petitioner in support of the petition for certiorari herein, and, in the event that they have such a right as parties, that their brief be considered as a brief by co-parties petitioner,

with or without formal order of leave, as this Honorable Court may deem meet.

Compliance with the rules for amicus petitions where consent of counsel cannot be obtained establishes the same interest which is relevant to applicants' standing as petitioning parties.

Applicants endeavor to comply with paragraph 9b of Rule 27 by filing their motion a reasonable time prior to the consideration by this Honorable Court of the petition for certiorari of the Delaware and Hudson Company in the above-entitled cause. Their interest is easily stated. Compliance with paragraph 9c of Rule 27 at this stage of the proceeding, by stating the relevance to this case of the facts or questions of law that applicants believe will not be adequately presented by the parties, appears to require a brief analysis of the case as they understand it.

The Interest of Applicants.

Mr. Dayton P. Haigney and his undersigned associates are substantial holders of preferred stock in the Boston Railroad Holding Company with a substantial direct financial interest in the outcome of this litigation, as more fully appears from his affidavit which is hereto annexed. They are fully qualified members of the class on behalf of whom the pending proceeding is prosecuted by the Delaware and Hudson Company. On January 9, 1952, they moved the Supreme Judicial Court of Massachusetts sitting in Suffolk County to be admitted as co-petitioners with the Delaware and Hudson Company on the class petition there which the pending petition of said company now seeks to bring here by writ of certiorari. That motion was denied solely on the ground that it came too late. The reason for applicants' delay in seeking separate representation is explained in Mr. Haigney's affidavit.

Reasons for Believing that Questions of Law and Fact will Not be Adequately Presented by Other Parties.

From voluminous documents relatively simple facts emerge:

The dominating stockholder in a corporation sells some of its holding of preferred stock with a guaranty of principal and interest. As an inducement to the modification of an anti-trust decree against it, the guarantor prays and procures a decree of a federal anti-trust court declaring the guaranteed shares entitled to priority in any liquidation, and causes notice of said decree to be stamped on such certificates as a safeguard (and consequently an invitation) to investment therein. The guarantor later suffers reorganization in bankruptcy pursuant to a plan of reorganization which does not deal with claims against the corporation issuing the stock, except by expressly saving the security of the guaranteed stock under the anti-trust decree. The issuing corporation, thus in the position of a principal obligor, has not been reorganized, but the guarantor is now discharged in bankruptcy and its assets, including its retained shares of the preferred stock issue in question, are transferred to the reorganized corporation.

The principal obligor is now undergoing liquidation in a state court. The state court, under the spell of a masterly and ingenious brief for the guarantor, finds the anti-trust decree to be merely declaratory of the pre-existing guaranty, so that the discharge of the guaranty in bankruptcy causes the decreed priority to evanesce in thin air (like a use executed upon an extinguished scintilla juris). Cf. *Pimbe's Case*, Moore, 196 (1585). The federally decreed safeguard and invitation is converted into a trap for the investing public. The security saved the public investors by the federal reorganization decree is impaired to the extent of 90%.

Learned, able and distinguished counsel for petitioner, Delaware and Hudson Company, will doubtless adequately expound the patent federal errors, but the mere existence of clear federal error is inadequate to support a petition for certiorari. Consequently, to show how applicants are not adequately represented, it becomes necessary at this point to indulge in corporate personalities.

The assets, exclusive of cash, of the obligor, the Boston Railroad Holding Company, have been and are solely Boston and Maine stock. The historic aspirations of the guarantor, New Haven Railroad, with reference to New England transportation in general and to the Boston and Maine in particular, were brilliantly disclosed by Louis D. Brandeis, Esq., before the Holding Company was formed. The conflicting aspirations of the petitioner, Delaware and Hudson Company, were conceived long before they were publicly proclaimed by President Loree before the Interstate Commerce Commission in 1923. Down through the decades control of the Boston and Maine and its traffic has been the subject of a cold war. Viewed in perspective, this litigation appears as a minor skirmish in a forty-year campaign. The New Haven asserted an equitable lien in the court below, as a creditor, superior to all stock claimants, on the basis of getting to the Boston and Maine front "fustest with the mostest." This afforded the state court an opportunity to administer symmetrical justice by denying contentions of both parties. That court may have deemed that the funds here in issue might as well go into the war chest whence the bulk of them originally came.

The class character of this suit seems to have been quite overlooked by the state court. This conclusion is supported by the fact, among others, that the court's opinion suggests the absence of evidence that the Delaware and Hudson acquired its stock on the faith of the stamp declaring a priority under the anti-trust decree. The extraordinary

suggestion that a purchaser of a negotiable instrument would not rely on its express terms, particularly when reciting a judicial determination thereof, seems explicable only on the hypothesis that the petitioner was assumed to be preoccupied with traffic to the virtual exclusion of investment considerations. In addition to the ten thousand shares of "publicly" held preferred stock held by the Delaware and Hudson Company, the Amoskeag Company (which also holds both New Haven and Delaware and Hudson securities) has nearly four thousand shares, but approximately ten thousand additional shares are held by scattered members of the general public. Mr. Haigney represents the undiluted interests of the investing public without qualification or conflict of interest. The interest *asserted* by the Delaware and Hudson in this litigation is identical. The difficulty that company encounters in standing for that interest undiluted by considerations of railroad rivalry does not apply to Mr. Haigney or his associates.

Applicants wish to make crystal clear that, apart from establishing their financial interest, they do not pray this Honorable Court to take judicial notice of such facts outside the record here, or to indulge in speculation concerning who controls whom, to what extent and to what end. On the contrary, they seek to disassociate themselves from such matters of common knowledge which properly may and almost inevitably will be the subject of judicial notice.

A petition for certiorari once granted, the legal issues in this case are sharply defined. They become a simple mater of the application of established law to an agreed statement of facts. This Honorable Court has helped the Bar by giving reasons for granting certiorari, when granted. But the burden of frequent statements of reasons for denying petitions for certiorari would defeat the purpose of requiring such writs, so little authority can be

found to show why such petitions are denied. Certainly members of this Honorable Court have given indications that their task in selecting cases for consideration on the merits is one of judicial statesmanship as much as legal technology. With this in mind, applicants fear that, when this controversy is viewed in the light of broad public interests, the struggle of the Titans may cloud the claim of these relatively obscure members of the general investing public. It is common knowledge that the Boston Railroad Holding Company was formed and this stock was put upon the market in an attempt to cause public investors to intervene between the New Haven and the Boston and Maine. The federal anti-trust decree was issued to protect them for having ventured into what had proved to be a dangerous minority position. They have been forgotten by the state court and pray recognition of the federal interest in their protection, and to this end they seek respectfully to emphasize the class character of these proceedings, through filing their brief. Their plight and their counsel's reflections may perhaps also be worthy of the attention of this Honorable Court when it comes to weigh the broad federal issues and policies, which transcend the interests of railroad companies, and which are of primary concern in passing on the allowance of petitions for certiorari.

Distinguished counsel for the Delaware and Hudson have been at once friendly toward these applicants, zealous in the interests of their client, and impeccable toward both. An inspection of a first draft of their petition and brief, generously tendered, discloses no lack of exposition of federal error. There is, however, no reference, at this stage at least, to such questions as the repercussions upon the administration of corporate reorganization in bankruptcy if the decision below is to stand. This Honorable Court has recently been concerned with insuring that a bankruptcy reorganization court have jurisdiction to go

into the affairs of corporations not under reorganization to the extent necessary for the disposition of the task before that court—collecting and redistributing the debtor's assets—but this Court may be equally concerned with permitting the bankruptcy court to keep its task within manageable bounds. If reorganization decrees are automatically going to vest the reorganized corporation with a federal promotion to displace senior interests in corporations not under reorganization, security holders in any corporation in which the debtor has investments must come into the reorganization court and pray not to be displaced without notice and hearing. A judge will be overwhelmed by the solicitations of ten parties with groundless fears for every single party who would really suffer by an application of the doctrine applied by the state court in this case. Goodness knows the task of the trial judge in the New Haven reorganization was onerous enough. If he had been compelled to consider issues such as those the state court deems him to have adjudicated here, the task would have been at once insurmountable and interminable.

At these applicants' suggestion, the petitioner, Delaware and Hudson Company, may call the attention of this Honorable Court to the applicability here of the policy of *State of Missouri* v. *Mayfield*, 340 U.S. 1, 71 S. Ct. 1, 3 (1950), which attaches importance to relieving state courts of misapprehensions concerning federal limitations on their powers to decide cases in accordance with justice under state law. These applicants would like to be heard on such questions.

WHEREFORE your applicants pray this Honorable Court (without prejudice to any right they may have without special leave of court to submit a brief in support of the petition for certiorari of the Delaware and Hudson Company) for leave to file a brief as friends of court, and in the event that such brief may be considered as the brief of co-

parties petitioner, that it be so considered, with or without formal order granting special leave, as to this Honorable Court may seem meet.

DAYTON P. HAIGNEY,
DOROTHY G. HAIGNEY,
DAYTON HAIGNEY AND CO., INC.,
By JAMES ANGELL MACLACHLAN,
Solicitor.

Supreme Court of the United States.

OCTOBER TERM, 1951.

THE DELAWARE AND HUDSON COMPANY ET AL.,
Petitioners,
v.
BOSTON RAILROAD HOLDING COMPANY ET AL.,
Respondents.

AFFIDAVIT IN SUPPORT OF MOTION OF DAYTON P. HAIGNEY AND ASSOCIATES FOR LEAVE TO FILE THEIR BRIEF.

I, Dayton P. Haigney, make this my sworn statement to establish my interest and the interest of my associates in the above entitled cause, to establish our qualifications as members of the class on behalf of whom this proceeding is prosecuted, and to explain our delay in attempting to become formal parties to the record.

At the time of the decree of the Supreme Judicial Court of Massachusetts determining the priority of the publicly held preferred stock of the Boston Railroad Holding Company, I was the beneficial owner of 506 shares and the holder of record of 33 shares of such stock. Dorothy G. Haigney was and is the beneficial owner of 50 shares and the holder of record of 360 shares of said stock. Dayton Haigney and Company, Inc., was and is the beneficial owner of 184 shares of said stock. Since such decree I have assigned my beneficial interest in 50 shares to a nominee

of my attorney on account of legal services rendered, but my interest has not otherwise changed. The aggregate of 749 shares is beneficially held by said persons solely as members of the general investing public. A correct photostatic copy of one of our certificates is hereto annexed and made a part hereof. All are in identical form.

I am professionally engaged as a dealer in unlisted securities, dealing chiefly with other brokers. I am what is known as a "position" trader. My economic function is to furnish a market for unlisted securities when anybody desires to sell and no buyer is immediately available to take the security at a price satisfactory to the seller, and to perform a comparable service for buyers who wish to acquire securities. I endeavor to sell securities I buy at a sufficient advance in price to cover my costs of operation, to cover the risks of an occasional heavy loss from having securities decline in my hands, and to glean such additional profit as the competitive nature of the business will permit. I publish at short intervals my bid and asked prices, representing the prices at which I am willing to buy and prices at which I am willing to sell some dozens of securities in which I am actively interested. These securities have included the Boston Railroad Holding Company preferred stock since 1929 or earlier. I am not, and never have been, a professional litigant or a dealer in securities in litigation, except to the extent that the securities I follow and deal in for regular market reasons occasionally become the subject of litigation. In fact, during the sixteen years that I have been in business as an unlisted broker, I have never taken legal action in a securities suit nor have I ever been a party in such a suit. It is my design to keep the bulk of my capital free to carry on my business of promoting the exchange of unlisted securities between willing sellers and willing buyers. It is one of the hazards of my business that the market will occasionally move heavily against me,

and I may occasionally have relatively large amounts of capital tied up for an extended period in an unfortunate commitment. The extraordinary market decline of Boston Railroad Holding Company publicly held preferred stock coming upon the decision of the Massachusetts Supreme Court in November, 1935, represents a severe loss to me.

In 1947, Frederic C. Dumaine, Jr., now President of the New Haven Railroad, approached me in his capacity as a director of the Investing Company to join with his interests in a petition for liquidation of the Boston Railroad Holding Company. I declined to accede, deeming that his interests as a railroad financier conflicted with mine as an owner of securities not concerned with freight interchange or financial control.

I was not worried about the priority of my shares. I relied upon the stamping on my certificates which read:

> "The shares represented by the within certificate are entitled to preference in liquidation according to the terms of the decree entered by the District Court of the United States for the Southern District of New York on October 17th, 1934, as modified by the decree of said Court entered on the 4th day of June, 1935, in the case of the United States of America v. The New York, New Haven and Hartford Railroad Company and others."

This stamp appears on the face of the annexed certificate, reading at right angles to the original text.

I was completely taken by surprise by the decision of the Massachusetts Supreme Court in November, 1935, and was caught long seven hundred and forty shares of the stock, which was an unusually heavy inventory of such stock for me to carry in relation to the size of my business and the potential demands of my customers. These held

ings have become virtually unmarketable at the present time.

Upon consulting counsel after that decision, on December 23, 1951, I first came to understand the procedure of a class suit in general, and in particular to be advised that a petition filed by the Delaware and Hudson Company on December 7, 1949, to determine the priority of the publicly held preferred shares was a class suit in which the interest asserted by the Delaware and Hudson Company was identical with my interest and the interests of my associates. I thereupon tried to have our interests so recognized by a motion in the Massachusetts Supreme Court, but that court said the motion came too late for its attention, since the matter was already disposed of, so far as that court was concerned.

My associates have at all times left this business entirely in my charge. I am now seeking, on their behalf and mine, the earliest opportunity to bring our case to the attention of the United States Supreme Court in some appropriate manner.

DAYTON P. HAIGNEY.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

Subscribed and sworn to before me, a notary public in and for said county, this 29 day of January, 1952.

JOHN M. GILBERT
Notary Public.

Notary Public for the Commonwealth of Massachusetts.
My Commission Expires Feb. 18, 1955.

[Seal]

100 SHARES

BA1428

100 SHARES

BOSTON RAILROAD HOLDING COMPANY

INCORPORATED UNDER THE LAWS OF THE COMMONWEALTH OF MASSACHUSETTS.

THIS CERTIFICATE IS TRANSFERABLE EITHER IN NEW YORK CITY OR BOSTON, MASS.

This Certifies That ********* DOROTHY G. HAIGNEY **********

is the owner of ONE HUNDRED

of the Preferred Capital Stock of the Boston Railroad Holding Company transferable in person or by attorney upon surrender of this Certificate properly endorsed.

The Preferred Shares of Stock represented by this Certificate are entitled to [illegible] year 1947. The stock represented by this Certificate is issued and held subject to the restrictions, qualifications and conditions prescribed by the Articles of Organization and by the By-Laws of the Company, to all of which the holder of this Certificate by acceptance hereof assents. The holders of said Preferred Shares are entitled to receive dividends at the rate of four per centum (4%) per annum and no more, payable [illegible] and cannot exceed the rate of four per centum (4%) per annum [illegible]

CANCELLED

This certificate is not valid until countersigned by the Transfer Agent and the Registrar.

In Witness Whereof, the Boston Railroad Holding Company has caused its corporate seal to be hereunto affixed and this certificate to be signed by its duly authorized officers this July 8, 1947.

BOSTON RAILROAD HOLDING COMPANY · 1909 · BOSTON

SHARES $100. EACH

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1951

DIXIE BROKERAGE & GUARANTY COMPANY OF JACKSON, INC., ET AL — APPELLANTS

v.

No._____

MRS. THOMAS L. BAILEY, STATE TAX COLLECTOR — APPELLEE

STIPULATION

There is presently pending in the above entitled court, No. 688, October Term 1951, entitled Hays Finance Company, et al, v. Mrs. Thomas L. Bailey, State Tax Collector, wherein the sole variances between that case and the above entitled cause are

(a) Both years were embraced in the same declaration instead of being in two separate declarations.

(b) No deposition whatsoever was introduced in evidence in the above entitled cause, but the same was tried exclusively upon stipulation.

(c) There was no written opinion of the Supreme Court of the State of Mississippi when the suggestion of error was overruled.

(d) There was no motion made for a hearing en banc with an opinion thereon.

The opinions in the two causes on the merits rendered by the Supreme Court of Mississippi, though varying somewhat, are substantially the same in legal effect. Compare Hays Finance Company v. Bailey, Miss., 54 So. 2nd 727; Dixie Brokerage & Guaranty Co. v. Bailey, ____ Miss. ____, 55 So. 2nd 438.

It is hereby stipulated by and between counsel for the respective parties that this cause may abide the decision of this Court in said No. 688 and whatever judgment this Court may therein render may be, pursuant hereto, rendered in this cause, and that in this cause by reason of this agreement, there need not be printed any portion of the record (save as this Court may otherwise order), nor any jurisdictional statement, nor brief upon the part of appellee to dismiss or affirm, an appropriate

motion thereof having been in this Court made, and no response by appellant to this motion, and no statement as to the grounds relied upon for reversal, nor need there be any briefs on the merits in this cause filed.

However, should the Court deem that there must needs be any portion of the record or other instruments printed the parties will upon notice forthwith conform.

For the rendition in this cause of a judgment conformable to that to be rendered in Cause No. 688, this stipulation shall be full warrant to the Court and it may thereon rely.

This the 22nd day of April, 1952.

/s/ Hubert Elton Lipscomb
Hubert S. Lipscomb
Lamar Building
Jackson, Mississippi

/s/ John G. Burkett
John G. Burkett
Lamar Building
Jackson, Mississippi

/s/ E. W. Stennett
E. W. Stennett
City Hall
Jackson, Mississippi

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